BEFORE THE PUBLIC SERVICE COMMISSION OF WYOMING

IN THE MATTER OF THE APPLICATION OF CHEYENNE LIGHT, FUEL AND POWER COMPANY TO FILE THEIR DECEMBER 2002 POWER RESOURCE PLAN	Docket No. 20003-EA-02-67 (Record No. 7994)

APPEARANCES

For the Applicant, Cheyenne Light Fuel and Power Company (Cheyenne Light):
BRIAN J. HANIFY of Sundahl, Powers, Kapp & Martin, Cheyenne, Wyoming; and PAULA M. CONNELLY, Assistant General Counsel, Xcel Energy, Denver, Colorado.

For the Intervenor, Office of Consumer Advocate of the Wyoming Public Service Commission (OCA):
CHRISTOPHER PETRIE and ANTHONY M. REYES, Cheyenne, Wyoming.

For the Intervenors, Black Hills Wyoming, Inc., and Black Hills Generation, Inc. (collectively, Black Hills):
RANDALL B. REED of Dray, Thomson & Dykeman, Cheyenne, Wyoming; and JUDITH M. MATLOCK of Davis, Graham & Stubbs of Denver, Colorado

For the Intervenor, Frontier Refining, Inc. (Frontier):
ALEXANDER K. DAVISON of Patton and Davison, Cheyenne, Wyoming; and MARK A. DAVIDSON of Dufford & Brown, Denver, Colorado.

For the Intervenor, Elk Power II, LLC (Elk Power):
WALTER F. EGGERS, III of Holland & Hart, Cheyenne, Wyoming.

For the Intervenor, City of Cheyenne, Wyoming (the City):
KENNETH W. LEWIS, City Engineer, Planning and Development Department, Cheyenne, Wyoming.

Intervenor TIMOTHY C. KINGSTON, *pro se* (Kingston), of Graves, Miller & Kingston, P.C., Cheyenne, Wyoming.

HEARD BEFORE

Chairman STEVE ELLENBECKER
Deputy Chair KRISTIN H. LEE
Commissioner STEVE FURTNEY

Chairman Ellenbecker presiding

FINAL ORDER

(Issued February 28, 2004)

This matter is now before the Wyoming Public Service Commission (Commission) upon the application of Cheyenne Light to file its December 2002 Power Resource Plan, and on the interventions of the Office of Consumer Advocate, Frontier, Black Hills, Elk Power, Kingston, and the City. The Commission, having heard the testimony in this case, reviewed the record thereof and its files concerning Cheyenne Light, applicable Wyoming utility law, and being otherwise fully advised in the premises, HEREBY FINDS AND CONCLUDES:

Procedural Matters

1. On December 20, 2002, Cheyenne Light filed its 2002 Resource Plan (the Plan), setting forth the plans under which it intends to procure wholesale electricity supplies for a three to fifteen year period beginning on January 1, 2004. Cheyenne Light stated in the Plan that it was being submitted pursuant to the Settlement Agreement entered into between Cheyenne Light and the Commission's Consumer Advocate Staff (Consumer Advocate Staff), which was approved by the Commission in Dockets No. 20003-ES-01-58 and 20003-EP-01-59 by its order of August 23, 2001 (the Settlement Agreement) which established an ongoing formal resource planning requirement for Cheyenne Light. Cheyenne Light submitted its 2001 plan in Docket No. 20003-EI-01-65. After an examination of the 2001 Plan, Cheyenne Light and the Commission's staff agreed to a Stipulation, under which the 2001 Resource Plan docket would be closed by the Commission and the Stipulation's additional criteria would be applied to the subsequent yearly plans filed by Cheyenne Light, subject to the Commission's approval and its continuing jurisdiction to modify any requirement of the process as necessary in the public interest.

2. On December 23, 2002, Cheyenne Light submitted a letter to the Commission describing the responses received concerning its Request for Proposals (the 2002 RFP) for power supplies for its total electric capacity and energy requirements beginning on January 1, 2004, and setting forth a schedule for further activities in the resource acquisition process.

3. On December 26, 2002, Cheyenne Light filed its additional Exhibits B and C which related to bidding by Cheyenne Light's affiliate, Public Service Company of Colorado (PSCo). It amended Exhibit B on January 17, 2003.

4. On January 21, 2003, the Consumer Advocate Staff filed a copy of the Stipulation and Agreement entered into between it and Cheyenne Light which the Consumer Advocate Staff characterized as resolving all matters associated with the Company's 2001 Resource Plan filing.

5. On March 28, 2003, the Commission issued its Order Closing Proceeding in Docket No. 20003-EI-01-65 and Approving Stipulation for use in Docket No. 20003-EA-02-67 and Later Resource Plan Filings.

6. On April 3, 2003, the Commission issued a Notice of Application in this case which provided for an intervention deadline of May 2, 2003. The Notice of Application was published once per week for two consecutive weeks in the *Wyoming Tribune-Eagle* in Cheyenne and broadcast on radio five times per week for two consecutive weeks on KFBC in Cheyenne.

7. On April 30, 2003, Elk Power filed its Petition for an Order Requiring Cheyenne Light, Fuel and Power to Enter Into a Power Purchase Agreement With Elk Power and For an Order Staying Cheyenne Light, Fuel and Power's Current and Proposed Purchase Arrangements With Non-Qualifying Facilities (the Elk Power Petition). In its petition, Elk Power stated that on January 24, 2003, it submitted a power supply proposal to Cheyenne Light in response to the 2002 RFP. In its proposal, Elk Power explained that it is a special purpose entity established to develop the Elk Power Generating Station (the Project), a planned waste coal power facility located in Northeastern Wyoming. Elk Power explained that the Generating Station was intended to use waste coal, created during mining operations, as fuel for the generation of electricity. Elk Power stated in its power supply proposal that the Project was a Qualifying Facility (QF) and that Elk Power was submitting its proposal as a QF offer. In a letter of January 31, 2003, attached to the Elk Power Petition, Cheyenne Light rejected Elk Power's proposal on the grounds that Elk Power did not submit a full-requirements bid, a $5,000 bid evaluation fee, or a proposal for an "in-service date" of 2004. Elk Power argued that the Public Utility Regulatory Policies Act of 1978 (PURPA) requires an electric utility like Cheyenne Light to purchase electric energy from a QF, such as Elk Power, before it purchases from a non-QF source. Elk Power requested that the Commission enter an order directing Cheyenne Light, *inter alia*, pursuant to PURPA, to promptly enter into a power purchase agreement with Elk Power at "fair, just, and reasonable rates."

8. By its Order Authorizing Intervention of May 1, 2003, the Commission granted the motion of Kingston to Intervene, giving him party status in the proceeding.

9. By its Orders Authorizing Intervention of May 12, 2003, the Commission granted the motions of Elk Power and the City, giving them party status in the proceeding.

10. By its Order Authorizing Intervention of May 27, 2003, the Commission granted the motion of the Office of Consumer Advocate (OCA) to Intervene, giving them party status in the proceeding. This Order had the effect of substituting the Office of Consumer Advocate for the Consumer Advocate Staff according to the statutes establishing the Office of Consumer Advocate. See, W.S. §§ 37-2-401 through 2-404.

11. On June 12, 2003, the Commission issued its Order Setting Pre-Hearing Conference, setting a pre-hearing conference for July 2, 2003, to plan and schedule the orderly and complete consideration and disposition of the case. Notice of the pre-hearing conference was published once per week for two consecutive weeks in the *Wyoming Tribune-Eagle* in Cheyenne and was broadcast on radio five times per week for two consecutive weeks on KFBC in Cheyenne.

12. On June 18, 2003, Cheyenne Light filed its Motion for Admission *pro hac vice* requesting that Paula M. Connelly, Assistant General Counsel of Excel Energy Services, Inc., be admitted as Co-Counsel for Cheyenne Light in this case. On June 26, 2003, it filed an amended Certificate of Service for this motion. This motion was granted by the Commission at the pre-hearing conference, described *infra*, and confirmed in the order on pre-hearing conference issued on July 31, 2003.

13. On July 2, 2003, and pursuant to due notice, the prehearing conference was held in the Commission's hearing room in Cheyenne, with Cheyenne Light, the Office of Consumer Advocate, Elk Power, Kingston, and the City appearing and participating to the extent they saw fit.

14. On July 2, 2003, Cheyenne Light filed its Addendum-Public Version of the Plan which included a report on the results of the 2002 RFP, a comparison to self-supply options, and introductions of an alternative proposal to the 2002 RFP results. On that day, Cheyenne Light also filed a Motion for Protective Order, seeking to have the information concerning bids received in response to its 2002 RFP kept confidential because of the risk that other participants in the case (except for the Office of Consumer Advocate) might become bidders in the process.

15. The Office of Consumer Advocate filed a proposed procedural schedule for the conclusion of this case on July 11, 2003; and, on July 17, 2003, Cheyenne Light filed a Motion for Scheduling Order proposing an alternative schedule.

16. On July 18, 2003, Frontier filed [i] its Petition for Leave to Intervene and Request For Hearing, and [ii] a Motion for Admission *pro hac vice* regarding Mark A. Davidson of Dufford & Brown, Denver, Colorado. By its Order of July 22, 2003, the Commission granted party status to Frontier and admitted Davidson to practice *pro hac vice*.

17. On July 22, 2003, the City filed a letter requesting leave to withdraw its intervention in this case, stating that it wished to rely on the Office of Consumer Advocate to represent its interests and interests of the City's residents. The Commission heard the City's request at open meeting on July 24, 2003, and granted it, issuing an order to that effect on July 29, 2003.

18. In the Order on Pre-Hearing Conference and Related Procedural Matters, issued on July 31, 2003, the Commission:

a. admitted Paula M. Connelly, Assistant General Counsel for Xcel Energy, of Denver, Colorado, *pro hac vice* as counsel for Cheyenne Light in this case;

b. granted Cheyenne Light's Motion for Protective Order regarding confidential bid and bid-related information, specifying also a form of Nondisclosure Agreement and excluding Two Elk from viewing certain commercially sensitive bid information;

c. declined to make a selection among resource alternatives for Cheyenne Light, deeming it "Cheyenne Light's responsibility to acquire the least-cost suitably reliable resources to meet its needs" and stating that the Commission's role is only to ". . . evaluate the company's selection to make certain that it has selected least cost reliable resources. To do otherwise would require us to engage in managing the utility, which is beyond the scope of our responsibility";

d. established a procedural schedule and set the public hearing in this case for September 22, 2003, in the Commission's hearing room in Cheyenne;

e. established discovery parameters under the Wyoming Rules of Civil Procedure and the Wyoming Administrative Procedure Act; and

f. stated that the legal and factual issues raised by Two Elk concerning its potential relationship to Cheyenne Light as a supplier of power and as a QF under PURPA could be argued at the public hearing, inviting ". . . argument on whether these issues are properly before the Commission in this case and this public hearing or should be decided in a different case or a different jurisdiction."

Thereafter, on September 8, 2003, the Commission provided for notice to the public of the public hearing to be held on September 22, 2003, with a public notice being published once per week for two consecutive weeks in the *Wyoming Tribune-Eagle* in Cheyenne, and broadcast on radio five times per week for two consecutive weeks on KFBC in Cheyenne.

19. On August 11, 2003, Cheyenne Light filed its Addendum II-Public Version to the 2002 Resource plan Concerning Electricity Supplies to update the prices and terms for which the PSCo was willing to provide full requirements capacity and energy services to the Company.

20. On August 18, 2003, Cheyenne Light filed the prepared direct testimony of Richard L. Kaysen, and the prepared direct testimony and exhibits of Mark P. McGree.

21. On August 21, 2003, Cheyenne Light filed its Notice of Service and Motion to Modify Order on Confidentiality. In its motion, the Company requested that Frontier be prohibited from access to information designated confidential pursuant to the Commission's July 31, 2003, Order because Frontier might be or become itself a developer and generator of electricity. On September 4, 2003, Frontier informed the Commission by e-mail that it did not oppose the relief requested in Cheyenne Light's Motion, stating its understanding that the information to be kept confidential ". . . is limited to specific pricing information regarding the bids received in response to the request for proposals." On September 11, 2003, the Commission issued its Order Modifying Application of Order on Confidentiality to exclude Frontier from access to Confidential Information on the same basis on which Elk Power was excluded.

22. On August 25, 2003, Black Hills filed their [i] Petition to Intervene out of time, and [ii] Motion for Admission *pro hac vice* for Judith M. Matlock of Davis, Graham & Stubbs of Denver, Colorado. By its September 2, 2003, Order Authorizing Intervention

and Granting Motion for Admission *pro hac vice*, the Commission granted both motions, providing that, because of its late intervention, Black Hills would take the case as it found it. Black Hills was thereby granted party status in this case.

23. On September 5, 2003, Elk Power filed its Prehearing Memorandum on Dispositive Legal Issues in which it reiterated its positions regarding Cheyenne Light's obligations under PURPA, and requested, *inter alia*, that the Commission enter an order recognizing Elk Power as a QF, rejecting Cheyenne Light's attempt to include Elk Power in a competitive bidding resource acquisition process, and requiring Cheyenne Light to enter into the long-term power supply contract proposed by Elk Power at an avoided cost rate to be determined by the Commission during the hearing in this matter. Elk Power also took issue with Cheyenne Light's "reacquisition" on December 31, 2003, of two power supply agreements currently assigned to Cheyenne Light's affiliate, PSCo, and Black Hills (the Gillette and Wygen Agreements), noting that Black Hills was not a QF provider.

24. On September 10, 2003, Kingston filed a Request to Withdraw Intervention. The Commission granted the Motion at its open meeting of September 18, 2003, issuing an order to that effect on that day. The Order required Kingston to ". . . dispose of any Confidential Information in his possession within thirty (30) days of this Order, and otherwise in compliance with the Commission's July 31, 2003, Order on Pre-Hearing Conference and Related Procedural Matters."

25. On September 12, 2003, the OCA filed the testimony of Denise K. Parrish; Frontier prefiled the testimony of Duncan Wohlgenant; Black Hills prefiled the testimony of David Rhodes, and Marjorie Hargrave; and Elk Power filed the testimony of Michael J. Ruffatto.

26. On September 17, 2003, Cheyenne Light filed a letter to the Commission advising that no bidder was willing to meet or beat PSCo's power supply offer and that Cheyenne Light had therefore decided to enter into a four-year, full requirements power supply arrangement with it.

27. On September 18, 2003, Black Hills filed its Prehearing Memorandum on the legal issues raised in Elk Power's April 30, 2003, Petition as supplemented by Elk Power's September 5, 2003, Prehearing Memorandum. Black Hills argued, *inter alia*, that Elk Power's request that the Commission enter an order preventing Cheyenne Light from "reacquiring" the Gillette and Wygen power supply agreements would be contrary to the plain language of the Temporary Assignments of those agreements to PSCo and would thus violate the sanctity of the contracts. In its Memorandum, Black Hills summarized the history of the Federal Energy Regulatory Commission's (FERC) interpretation of its own QF Rules, stating generally FERC has agreed that states may determine avoided costs for QFs either by administrative process or by a competitive bid process. Black Hills argued, *inter alia*, that nothing in PURPA or applicable regulations prohibits Cheyenne Light from entering into a contract with a non-QF to supply its power needs commencing on January 1, 2004. Black Hills further argued that PURPA does not require that a contract be awarded to an unsuccessful bidder, even if it is a QF, and does not prohibit the utility from entering into a contract with the successful bidder, even if it is a non-QF.

Furthermore, Black Hills noted that PURPA also does not require that a contract with a non-QF reserve capacity for a future use, nor does PURPA authorize or permit a state commission, at the request of a QF, to interfere with pre-existing contract rights, such as the Gillette and Wygen agreements, in order to create capacity for a QF.

28. On September 19, 2003, Cheyenne Light filed its Prehearing Memorandum in which it argued that the Commission cannot legally grant the relief requested in Elk Power's September 5, 2003, Prehearing Memorandum, stating that nothing in PURPA or in FERC's regulations implementing PURPA would sanction abrogation of existing power supply agreements. Cheyenne Light stated that the Gillette and Wygen agreements were wholesale contracts subject to the jurisdiction of FERC. Cheyenne Light further agreed with the arguments presented in the Black Hills Memorandum, requesting that the Commission deny the relief requested by Elk Power and further that it clarify [i] that Cheyenne Light may use a competitive bid process to determine its avoided costs to be paid to QFs, and [ii] that a QF must participate in a competitive bidding process and be the winning bidder in order to be awarded a contract with Cheyenne Light.

29. On September 22, 2003, the Commission issued a Special Order Authorizing One Commissioner or a Hearing Examiner to preside over the public hearings in this matter.

30. Pursuant to public notice and in accordance with the Wyoming Administrative Procedure Act and the Commission's Rules, the public hearing in this matter was held on September 22-24, 2003, at the Commission's hearing room at Cheyenne, Wyoming, with Cheyenne Light, Two Elk, the Office of Consumer Advocate, Frontier, and Black Hills appearing through counsel and participating to the extent they deemed necessary. Cheyenne Light presented the testimony of Richard L. Kaysen and Mark P, McGree; Two Elk presented the testimony of Michael J. Ruffatto; Black Hills presented the testimony of David Rhodes and Marjorie Hargrave; and Frontier presented the testimony of Joey Purdy, who also adopted the prefiled testimony of Duncan Wohlgenant for Frontier. The Office of Consumer Advocate presented its case through the testimony of Denise K. Parrish. The Commission closed the record in this case at the end of the public hearing. (Tr., p. 520.)

31. By its letter dated October 7, 2003, the Commission directed the parties to file and serve Proposed Findings of Fact and Conclusions of Law by October 20, 2003. Frontier, Black Hills, Cheyenne Light, the Office of Consumer Advocate, and Elk Power filed Proposed Findings of Fact and Conclusions of Law on October 20, 2003. Elk Power also filed a Request which will be discussed below.

32. On October 20, 2003, Elk Power filed its Request that the Commission Take Official Notice of Public Document and Receive Late Filed Exhibit in which it requested that the Commission accept the Verified Petition of PSCo for a Variance in the Filing Date of its Electric Least-Cost Resource Plan and for Shortened Response Time as a late-filed exhibit in this matter. Elk Power argued that "PSCo's resource needs are relevant to the Commission's consideration of Cheyenne Light's request that the

Commission approve its four-year contract with PSCo."

33. Pursuant to W.S. § 16-4-403, the Commission held public deliberations in this case on December 16, 2003, and directed the preparation of an order consistent with that decision.

Generally Applicable Legal Standards

34. Some of the legal considerations underpinning this order are discussed below in connection with our discussion of the subjects to which they pertain. However, the general legal standards which we are obliged by Wyoming law to apply are set out here.

35. Under W.S. § 37-2-112, the Commission has the general and exclusive power to regulate and supervise every public utility within Wyoming, including electric utilities as defined in W.S. § 37-1-101(a)(vi)(C).

36. The Wyoming Administrative Procedure Act requires our decisions to be supported by substantial evidence (W.S. § 16-3-114(c)(ii)(E)); and requires the support of "the type of evidence commonly relied upon by prudent men in the conduct of their serious affairs" (W.S. § 16-3-108(a)).

37. Regarding the rates produced by the Commission's processes, W.S. § 37-3-101, *Rates to be just, reasonable and uniform; exceptions*, sets out general parameters for those rates, noting that the Commission has the discretion to allow rates that vary based on circumstances, even in the same class of service:

> "All rates shall be just and reasonable, and all unjust and unreasonable rates are prohibited. A rate shall not be considered unjust or unreasonable on the basis that it is innovative in form or in substance, that it takes into consideration competitive marketplace elements or that it provides for incentives to a public utility. Except as otherwise provided in W.S. 15-7-407, no public utility shall in any manner charge, demand, collect or receive from any person greater or less or different compensation for any service rendered or to be rendered by the public utility than is charged, demanded, collected or received by the public utility from any other person for a like and contemporaneous service under similar circumstances and conditions. The commission may determine that rates for the same service may vary depending on cost, the competitive marketplace, the need for universally available and affordable service, the need for contribution to the joint and common costs of the public utility, volume and other discounts, and other reasonable business practices."

Under W. S. § 37-2-121, *When rate to be changed by commission; nontraditional rate making*, the Commission may alter rates which are ". . . inadequate or unremunerative, or to be unjust, or unreasonable, or unjustly discriminatory, or unduly preferential . . ."

38. Wyoming law gives broad powers to the Commission to inquire into the facts surrounding the determination of rates, including W. S. § 37-2-119, *Matters to be considered and determined in investigation*, which allows wide latitude in the Commission's investigation of rate-related matters. In accord is W.S. § 37-2-122(a), *Matters considered in fixing rates; order changing services or facilities*, which reinforces

the Commission's use of its sound informed discretion (e.g., "*may* take into account"):. It states:

> "In determining what are just and reasonable rates the commission may take into consideration availability or reliability of service, depreciation of plant, technological obsolescence of equipment, expense of operation, physical and other values of the plant, system, business and properties of the public utility whose rates are under consideration."

39. Additionally, W.S. § 37-2-127 states, in part, that:

> "In addition to the powers herein specifically granted, the commission shall have such implied or incidental powers as may be necessary and proper, effectually to carry out, perform and execute all the powers so granted."

40. Read together, these statutes describe the basic mechanism of the public interest standard which the Commission is to follow in its proceedings. The public interest must come first in our decisions; and, as the Wyoming Supreme Court has stated, the desires of the utility are secondary to it. *Mountain Fuel Supply Company v. Public Service Commission*, 662 P.2d 878 (Wyo. 1983). According to the Court in *Mountain Fuel*, 662 P.2d at 885:

> "We agree that if the end result complies with the 'just and reasonable' standard announced in the statute, the methodology used by the PSC is not a concern of this court, but is a matter encompassed within the prerogatives of the PSC."

In accord are *Great Western Sugar Co. v. Wyo. Public Service Comm'n and MDU*, 624 P.2d 1184 (Wyo. 1981); and *Union Tel Co. v. Public Service Comm'n*, 821 P.2d 550 (Wyo. 1991), wherein the Supreme Court stated, 821 P.2d at 563, that it ". . . has recognized that discretion is vested in the PSC in establishing rate-making methodology so long as the result reached is reasonable."

Facts Concerning the Plan, the 2002 RFP and the PSCo All-Requirements Contract

41. According to Cheyenne Light, the 2002 RFP yielded only unacceptable results. It received only three responses; and the best of them, although it met Cheyenne Light's general supply requirements, would have resulted in increased rates to Cheyenne Light's retail customers. (Cheyenne Light Exhibit 3, p. 3.) Cheyenne Light then solicited an offer from PSCo, which indicated its willingness to continue to serve Cheyenne Light's full requirements for four more years at a wholesale rate approved by FERC, noting that it had pending before FERC a wholesale rate case in FERC Docket No. ER03-971-000. The applicable rate in that case was projected to be lower than the best response Cheyenne Light received from the 2002 RFP. (Cheyenne Light Exhibit 3, p. 3.) Cheyenne Light therefore rejected all responses to the 2002 RFP. (Cheyenne Light Exhibit 3, p. 4.)

42. After rejecting the responses, Cheyenne Light gave the three responding companies another opportunity, a chance to match PSCo's more favorable terms and conditions and to "meet or beat" its proposed prices. (Cheyenne Light Exhibit 3, p. 4.) While this proposition was pending, PSCo offered to lower its prices for the four year power supply offer, the details of which are set forth in Addendum II filed on August 11, 2003. (Cheyenne Light Exhibit 3, exhibit MPM-03.)

43. Black Hills and Elk Power's parent company, North American Power Group, responded. Cheyenne Light rejected the response of North American Power Group because it did not meet or beat the four-year PSCo offer. On September 8, 2003, Black Hills withdrew its offer to meet or beat the PSCo four year offer. By letter dated September 17, 2003, Cheyenne Light informed the Commission that, since no bidder was willing to meet or beat the PSCo offer, it decided to enter into a four-year, full requirements power supply arrangement with PSCo. (Tr., pp. 78, and 109-110; and Cheyenne Light Exhibit 2.)

44. Cheyenne Light gave the reasons why it found the North American Power Group's proposal for power supplies to be unacceptable. It stated that it sought ". . . a four-year supply to reassess our long-term options" and North American Power Group responded with a proposal for a 33-year supply. Cheyenne Light thought that accepting such an agreement ". . . would have violated our spirit of the request for proposal process that we had cancelled just a few months earlier." Cheyenne Light also noted that the cancellation fee in the proposed agreement would have, if exercised in year five, amounted to between $93 million and $194 million. Cheyenne Light's understanding was that this cancellation fee was not subject to mitigation, meaning that the power could be sold elsewhere and Cheyenne Light would be responsible to pay the entire fee. Furthermore, Cheyenne Light attached great importance to ". . . the lack of pricing and operating characteristic information. We had no way to assess whether this -- the offer or the proposal would fit our system, would lead to higher costs or lower costs. We just didn't have any information upon which to base that decision." (Tr., pp. 460-462 and 505-506.)

45. Cheyenne Light testified that the four-year PSCo contract would result in an average system rate decrease from current rates. Importantly, the PSCo offer would result in rates less than [i] the best offer coming out of the 2002 RFP process, [ii] the self-build option identified by Cheyenne Light in the Plan, [iii] the self-purchase proposals identified in this docket or in the Plan, and [iv] the anticipated costs for the 2004 through 2008 period identified with respect to the original full requirements proposal. The PSCo result was cheaper than had been anticipated in the Plan. (Tr. p. 84.) On rebuttal, Cheyenne Light testified in support of the four-year, full requirements contract with Public Service (Tr., pp. 412-415) and responded to the concerns raised by the Office of Consumer Advocate (Tr. pgs. 415-431, 439-451).

46. Denise K. Parrish addressed the Plan for the Office of Consumer Advocate, stating that it did not contain all of the information required by the March 28, 2003, Stipulation and Agreement. (Office of Consumer Advocate Exhibit 1, pp. 6-16.) She asked the Commission to require Cheyenne Light to provide a thorough explanation of why it modified its 2002 Plan so dramatically when compared to its 2001 Plan. (Office of Consumer Advocate Exhibit 1, p. 16.) She also testified that Cheyenne Light did not give adequate consideration to the self-generation or equity investment options. (Tr., p. 332; and Office of Consumer Advocate Exhibit 1, pp. 17-22.) Parrish noted that the lack of explanations and supporting data in the Plan about why a particular result was reached was a major shortcoming of the Plan. In some cases, Cheyenne Light could not provide supporting documentation to back up conclusions in the Plan. (See, e.g., (Tr., pp. 333.)

She identified as shortcomings the fact that the Plan itself did not contain any mention of special contracts with customers or a process for dealing with potential purchases from QFs (although Cheyenne Light later suggested a bidding process). She also noted the lack of any discussion of demand side resources. (Tr., pp. 334-335.) She emphasized the possible value to Cheyenne Light of the use of special contracts to retain customers, to achieve the "peak shaving" benefits of moving higher demands off of the Cheyenne Light system peak, and to provide for interruptibility. (Tr., pp. 358-360.)

47. Parrish asked the Commission:

a. that Cheyenne Light be required to provide a thorough explanation of the differences between the 2001 and 2002 plan;

b. that it not approve Cheyenne Light's resource choices or costs associated with those choices in this case, reserving such decisions for a proceeding under Section 249 of the Commission's Rules; and

c. that the Commission should give direction to Cheyenne Light and the parties about the type of "information and analysis that it would like to see in future resource plans." (Tr., pp. 335-336.)

48. Parrish confirmed that the Office of Consumer Advocate did not object to Cheyenne Light entering into a four-year full requirements supply contract with PSCo and that it found no cheaper power supply options that might be available to Cheyenne Light for the period beginning on January 1, 2004. She cautioned the parties, however, that it was not the responsibility of the Commission or the Office of Consumer Advocate to develop these resource options. She further cautioned Cheyenne Light that ". . . the lack of objection of you entering into that contract would not be indicative necessarily of our position when you went to recover the costs associated with that contract." (Tr. p. 339.)

49. Regarding competitive bidding, Parrish recommended that the Commission ". . . not accept a competitive bid process after the fact in this proceeding" because that would constitute ". . . setting the rules for the game after the game is over." (Tr., pp. 336-337.)

50. For Frontier, Joey Purdy, testified that Frontier's primary concerns are price, price volatility and the reliability of Cheyenne Light's power supply (although the latter concern was somewhat less important in the context of this proceeding). (Tr. p. 312.)

51. Enumerating the relief it sought here, Elk Power first asked the Commission ". . . to direct Cheyenne Light, Fuel & Power to enter into a power sales agreement with Elk Power II. It also asked that the Commission set the avoided cost rates and then finally, for the Commission to approve the completed and executed contract between the parties for Cheyenne's rate recovery." (Tr., p. 194.) In its Petition to the Commission, described, *supra*, Elk Power stated things differently, asking the Commission to "prevent Cheyenne Light from executing or entering into any contracts with non-QFs

related to the 2002 Cheyenne Light RFP" and requesting an order requiring that any contract entered by Cheyenne Light with non-QF bidders must explicitly state that Cheyenne's requirements would be automatically reduced by the amount of its QF purchases. In closing argument, counsel for Elk Power added that:

> "Much has been made of the in-service date of the Elk Power QF. As you heard, the Elk Power delivery start date will be in late 2007 or 2008. Fortunately, recent developments in this case have provided a solution. The PSCo four-year contract will expire right when the Elk Power QF will come on line. Elk Power has not taken every step necessary in the development of the project to be ready for delivery in 2008 at this point, but that was not unusual and does not affect Cheyenne Light's obligation to contract with Elk Power." (Tr., p. 549.)

Conclusions on the Plan, the 2002 RFP and the PSCo All-Requirements Contract

52. Cheyenne Light does not contemplate entering into power supply contracts with any bidder (QF, non-QF, or otherwise) but decided to enter into a four-year all-requirements contract with PSCo, which did not participate in the 2002 RFP process. The four-year agreement with PSCo will expire before or almost at the time at which Elk Power stated that its facility might be coming on line.

53. Elk Power's request that the Commission issue an order preventing Cheyenne Light from executing or entering into power supply contracts with non-QFs related to the 2002 RFP is moot because Cheyenne Light rejected all bids offered in response to its 2002 RFP. The request of Elk Power that any contract entered by Cheyenne Light with non-QF bidders must explicitly state that Cheyenne's "requirements" will be automatically reduced by any and all QF purchases is moot. The 2002 RFP process is at an end, and no selections were made by Cheyenne Light as a part of that process.

54. All interested parties have had an opportunity to be heard regarding Cheyenne Light's 2002 Plan, as amended by the July 2, 2003, Addendum and the August 11, 2003, Addendum II. This proceeding has provided a full and fair opportunity for all interested parties to present arguments and views on the 2002 Plan and Cheyenne Light's decision to enter into a four-year, full requirements electric supply contract with PSCo. The public interest would not be served by rearguing these issues in another Cheyenne Light proceeding.

55. Once it was explained in hearing, the Cheyenne Light planning process was made to appear prudent and reasonable. The result of the entire process was not thereby brought under question (although we will not here decide on the rate impact of the PSCo contract or the planning process). The substantial evidence shows no glaring problems with the planning or the process, and the inadequacies of the Plan under consideration stem not from inadequate planning but from inadequate explanation of and support for the conclusions reached in the Plan. Future Plans should be less summary in nature and should contain adequate descriptions of the planning process and the supporting facts to show that Cheyenne Light did undertake serious explorations of the various alternatives open to it. We do not seek to encourage an unwieldy or merely bulky plan but one which provides a solid basis for evaluation of Cheyenne Light's planning

processes.

56. We do not believe that it would be useful for us to direct in great detail the content of future plans. We do, however, expect future plans to show consideration of all supply alternatives, including such options as all-requirements and other contracts whether managed by Cheyenne Light or by an affiliate, demand side management, construction of or participation in generation resources, the development of resource portfolios (administered by it or others), and competitive bidding processes. The Plan should discuss the costs and benefits of each alternative as Cheyenne Light sees them. Closely related subjects such as the need for ancillary services should be included.

57. If it would potentially be beneficial for Cheyenne Light to employ special contracts with larger customers to shift demands from on-peak to off-peak times or for other benefits described, *supra*, Cheyenne Light should include in its future plans a discussion of the benefits of load shifting to reduce system peaks and, therefore, costs. Cheyenne Light should, as part of its future planning processes, engage in discussions with those of its large customers which express an interest in such special contracts. The results should be set forth in its future resource plans.

58. Below, we discuss the subject of competitive bidding as it relates to Cheyenne Light's future resource acquisition plans. We will not impose a retroactive requirement in this case regarding competitive bidding, but will only require that the subject be treated by Cheyenne Light in ensuing resource plans. Because the subject is to be included in future plans, that will allow it to be examined and thoroughly tested as those plans mature.

The Facts of the Gillette and Wygen Contract Issue

59. In 2001, Cheyenne Light entered into two long-term power purchase agreements with Black Hills Wyoming, Inc., formerly known as Black Hills Generation, Inc.). This Power Purchase Agreement, the "Gillette Contract," is dated as of March 5, 2001, between Black Hills Generation, Inc. (now Black Hills Wyoming, Inc.), as seller, and Cheyenne Light, Fuel and Power Company, as purchaser, for 40 MW of unit contingent capacity. The Gillette Contract terminates on August 31, 2011. (Transcript of September 22, 2003, public hearing proceedings, hereinafter, Tr., pp. 102-103; and Black Hills Exhibit 1, pp. 4-5.)

60. The Wygen Contract is dated as of February 16, 2001, and is between Black Hills Generation, Inc. (now Black Hills Wyoming, Inc.), as seller, and Cheyenne Light, Fuel and Power Company, as purchaser, for 60 MW of unit contingent capacity. It terminates on March 31, 2013. (Tr. p. 102; and Black Hills Exhibit 1, pp. 2-3.)

61. Together, the Gillette and Wygen Contracts have the capability to supply 100 MW of the 182 MW total resource requirement forecasted for the Cheyenne Light system for 2004. (Cheyenne Light Addendum to 2002 Resource Plan, Revised Table 2.)

62. Cheyenne Light temporarily assigned its ". . . estate, rights, obligations,

title and interest . . . " under the Gillette and Wygen Contracts to PSCo in connection with the current full-requirements contract between Cheyenne Light and PSCo which expires on December 31, 2003. Cheyenne Light witness Mark McGree provided copies of the two Temporary Assignment, Assumption and Release Agreements among Cheyenne Light, PSCo and Black Hills. (Cheyenne Light Exhibit 3, exhibits MPM-08A and MPM-08B (Temporary Assignments.) The Temporary Assignments state that, for the period of February 25, 2001, through December 31, 2003, Cheyenne Light has assigned to PSCo the benefits of these two power purchase agreements and PSCo has assumed Cheyenne Light's obligations to Black Hills under these agreements. Specifically, Section 1.04 of each of the Temporary Assignments provides as follows:

> "As of the Termination Date of this Agreement, Cheyenne shall reassume all of the estate, rights, obligations, title and interest of Purchaser in, to and under the [Gillette or Wygen] PPA. No further assignment shall be required to effectuate resumption of Cheyenne's obligations under the [Gillette or Wygen] PPA."

63. Elk Power asked the Commission for an order preventing Cheyenne Light from "reacquiring" the Gillette and Wygen contracts, claiming that PURPA requires Cheyenne Light to purchase power from a QF, such as Elk Power, before it purchases power from any non-QF and that this priority applies "to the proposed re-assignment of the Gillette and Wygen Agreements from Public Service to Cheyenne Light, scheduled to occur on December 31, 2003.) (Elk Power Petition at pp. 9 and 15.)

64. For Black Hills, David Rhodes testified regarding the Gillette and Wygen contracts and the Temporary Assignments, stating that an order of the Commission which would interfere with Cheyenne Light's ability to perform those contracts upon termination of the Temporary Assignments, would cause Cheyenne Light to be in default under both contracts. (Tr. p. 278; and Black Hills Exhibit 1, p. 7.) Rhodes stated that, if existing contracts can be modified or terminated as proposed by Elk Power, it would be impossible to obtain the capital needed to build generating facilities because of the regulatory uncertainty. (Tr. p. 278; and Black Hills Exhibit 1, p. 7.) He stated that in order for competitive power markets to exist, the sanctity of contracts has to be recognized. (Black Hills Exhibit 1, p. 7.)

65. Marjorie Hargrave testified for Black Hills regarding existing project financing on the Gillette and Wygen facilities, noting that the existing debt totals approximately $167 million and that the source of revenue for repayment of that debt is the Gillette and Wygen contracts. (Tr. pp. 301-302; and Black Hills Exhibit 2, p. 2-4.) Hargrave testified that regulatory intervention modifying those contracts (including termination) would constitute an event of default resulting in acceleration of the loans. (Tr. p. 302; and Black Hills Exhibit 2, pp. 3 and 4.) Hargrave also stated that such an action would make it impossible to get financing backed by a power purchase agreement on a going forward basis. (Tr. p. 302; and Black Hills Exhibit 2, p. 5.)

66. For Cheyenne Light, Mark McGree stated Cheyenne Light's opinion that the Gillette and Wygen contracts would again become the obligation of Cheyenne Light upon the expiration of the existing PSCo contract on December 31, 2003, and asked the Commission not to interfere with these existing contracts. (Tr. pp. 80-81; and Cheyenne

Light Exhibit 3, p. 14.) McGree testified that Elk Power's request was contrary to the Settlement Agreement approved by the Commission in Dockets No. 20003-ES-01-58 and 20003-EP-01-59, which discussed the Gillette and Wygen Contracts. As noted by McGree, paragraph 8d(2)(ii) of the Settlement Agreement states:

> "Intervenors agree that they may not challenge the inclusion of the cost associated with the 60 MW coal contract and the 40 MW gas turbine contract with Black Hills Generation, Inc., or any other power costs incurred by Cheyenne Light in any future ECA filings on the basis of any action or inaction in connection with such contract or power costs occurring prior to May 11, 2001."

(*See*, Cheyenne Light Exhibit 3, p. 15.)

67. For Elk Power, Michael Ruffatto confirmed that his company was not seeking to abrogate or force a breach of the Gillette and Wygen agreements. He stated his understanding from the testimony earlier in the hearing that those contracts were automatically coming back to someone, presumably Cheyenne Light, on December 31, 2003. Ruffatto confirmed that it was not Elk Power's position that the QF power it would like to sell to Cheyenne Light has ". . . any kind of priority over the power purchase agreements that Black Hills has for Wygen and Gillette." (Tr., pp. 216-217.)

68. Notwithstanding this testimony, Elk Power's Petition requested an order prohibiting Cheyenne Light from "reacquiring" the Gillette and Wygen contracts. In connection with the four-year full requirements contract which Cheyenne Light has indicated it plans to execute with PSCo for service commencing on January 1, 2004, Cheyenne Light has indicated that it may again seek another temporary assignment of the Gillette and Wygen contracts to PSCo for the four-year term of that contract. (Tr. p. 107.) In its closing arguments, counsel for Black Hills reiterated its concern that, at the end of that additional assignment, a request could again be made for an order prohibiting Cheyenne Light from "reacquiring" the Gillette and Wygen contracts; and counsel argued that, consistent with its obligations to its lenders, it could not agree to further temporary assignments unless the question of whether the enforceability of these contracts against Cheyenne Light at the end of the *current* Temporary Assignment (or the end of any future temporary assignment) is resolved. (Tr. p. 523-524.)

Conclusions of Law regarding the Gillette and Wygen Contracts

69. Wyoming recognizes the sanctity of contract. *See, e.g., Reed v. Wadsworth*, 553 P.2d 1024, 1034 (Wyo. 1976). The Wyoming Supreme Court has also recognized that, in determining the meaning of contract provisions, one must ascertain the intent of the parties. *Shellhart v. Axford*, 285 P.2d 1031, 1034 (Wyo. 1971). Where the terms of a contract are plain and unambiguous, the meaning is to be determined from the language alone. *Craig v. Gudim*, 488 P.2d 316, 319 (Wyo. 1971). We are not inclined to disturb power supply agreements in the absence of a clear public policy reason to do so. *See, e.g., Union Tel. Exchange v. Wyoming Pub. Serv. Comm'n*, 910 P.2d 1362 (Wyo. 1996). There is also nothing in PURPA or in the FERC regulations under PURPA which encourage us to overturn existing power purchase agreements. Elk Power has cited to no legal authority that would support such a drastic action by the Commission.

70. The plain language of the Temporary Assignments is that they expire at the end of the day on December 31, 2003. (See, Cheyenne Light Exhibit 3, attached Exhibits MPM-08A and MPM-08B, paragraphs 1.04.) At that time, Cheyenne Light will again be the Purchaser under the Wygen and Gillette Contracts. There is no action on the part of Cheyenne Light or Public Service required for these contracts to again become the obligation of Cheyenne Light. Therefore, simple expiration of the Temporary Assignments does not constitute a "reacquisition" of either the Gillette or Wygen contracts. They were the obligation of Cheyenne Light upon execution, and this is not altered by the Temporary Assignments to PSCo.

71. We conclude that the Gillette and Wygen Contracts will again be the obligation of Cheyenne Light on January 1, 2004, based upon the express language of the Temporary Assignments as discussed, *supra*. If the Gillette and Wygen Contracts are again temporarily assigned, if these subsequent temporary assignments contain self-termination provisions to the same effect as those under consideration here, and if the circumstances are the same as they are in the instant case, those contracts, or any remaining portions thereof, should be the legal and enforceable obligations of Cheyenne Light upon the termination of the Temporary Assignments. We must add that any decision on future temporary assignments must be made on the facts as they then appear. The relief requested by Elk Power in this case concerning the Gillette and Wygen Contracts should be denied.

Facts Concerning Qualifying Facilities

72. In its Petition and in its testimony, Elk Power stated that it was in the process of developing an 80 MW small power production facility in southern Campbell County, Wyoming. Notice of the facility was filed with FERC in September of 2002 making it a self-certified QF under PURPA. Elk Power's position is that requiring a QF to compete with non-QFs to determine the awarding of a contract would render PURPA's preference for QFs meaningless. (Tr. pp. 193 and 548; and Elk Power Exhibit 1, attached Exhibit A.)

73. As noted above, Elk Power asked the Commission to direct Cheyenne Light to enter into a power sales agreement with it, to set the avoided cost rates, and to approve the completed and executed contract between the parties for Cheyenne Light's rate recovery. (Tr. p. 194.) Elk Power requested that the avoided cost rates be set on the basis of the bids made by non-QFs in response to the 2002 RFP, the terms of the Gillette and Wygen contracts, and the four-year PSCo all requirements contract. (*See*, Elk Power Prehearing Memorandum, p. 19.) Elk Power stated that financing was available from North American Power Group for developmental costs for the proposed QF; that Elk Power has applied to Campbell County for bonding authority; and that some preliminary engineering work has been performed. (Tr. pp. 196-197 and 224.)

74. Ruffatto acknowledged that Elk Power's QF would not be capable of providing either energy or capacity by January 1, 2004, and that there is no financing in place for construction of the facility. He stated that Elk Power has not applied for an air permit, that the nearest transmission line is six to ten miles away from the proposed site

of the facility and that there is no contract in place to connect the plant to any available transmission line. Elk Power has no transmission agreements in place to transmit capacity or energy to Cheyenne Light; and there are no executed purchase orders for turbines or generators for the facility. Ruffatto stated that Elk Power does not have all of the needed governmental permits; that it has not closed on any financing; that no foundation has been laid for the facility; that there are no contracts to purchase the waste coal on which the facility is to run; and that there are no construction contracts in place. Ruffatto acknowledged that Elk Power did not address the subject of ancillary services in the two letters of January 2003 sent by it to Cheyenne Light. (Tr. pp. 194-196, 199, 201-202, 205, 208, 210-21.)

75. Cheyenne Light discussed the meet or beat proposal submitted by North American Power Group, its generic responses to six clarifying questions asked of it by Cheyenne Light, the terms proposed by North American Power Group, the process of evaluating bids; and the risks associated with contracting for an 80-MW contract for a system like Cheyenne Light's which would require approximately 160-MW of capacity. (Tr. pp. 451-467.)

76. Black Hills testified that between 225 and 250 hours were spent on preparing its response to the 2002 RFP. (Black Hills Exhibit 1, p. 8.) It stated that Black Hills Generation, Inc., would not have bid to supply power under a contract where requirements would be automatically reduced by purchases from a future QF of the size proposed by Elk Power (80 MW). A possible reduction in capacity requirements of that size would make it impossible to obtain the financing necessary to construct new generating capacity. In order to have competitive power, Black Hills argued, bidders should be able to obtain financing; and, in order to obtain financing, they must have predictable capacity payments. (Tr. p. 278; and Black Hills Exhibit 1, p. 9.)

77. Black Hills argued that, if a QF had the right to match the winning bid in a competitive bidding process and thereby become the winning bidder, other bidders would be discouraged from putting in the substantial effort required to put forth their best proposal. In Black Hills' opinion, if QFs had such a right, it would eliminate competition. (Black Hills Exhibit 1, p. 10.) David Rhodes confirmed that, if QFs were allowed not to participate in a competitive bidding process but were allowed thereafter to match the lowest competitive bid, his company would probably not participate in future competitive bidding opportunities. If Black Hills did participate, Rhodes stated, it would not put in as much time to prepare its most competitive bid. Rhodes concluded that the net effect would be that Cheyenne Light would get higher-priced proposals, the price that the QF would have to meet would be higher and rates to the citizens of Wyoming would therefore also be higher. (Tr., pp. 278-279.)

78. Black Hills testified to the implications of the great latitude sought by Elk Power:

> "If there were any regulatory intervention to modify those agreements, including termination, or if there was the ability for a QF at some future date to step in and modify the PPA such that the amount of output purchased would be reduced and the payment stream would be reduced, those would constitute an event of defaults, accelerate the loan and would also, in our minds, make it very

-- it would make it impossible to get financings with a PPA on a going-forward basis." (Tr., p. 302.)

79. Black Hills presents us with the view, discussed below, of the changing circumstances in the electric power industry since the enactment of PURPA in 1978 and how they have driven changes in state and federal regulatory attitudes toward QFs as regulatory agencies seek to uphold the public interest in a dynamic industry:

a. The statutory objectives of PURPA, articulated in 1978, include the encouragement of cogeneration and small power production, energy conservation, the efficient use of facilities and resources by electric utilities and equitable rates for electric consumers. ¶32,022, FERC Notice of Proposed Rulemaking, Regulations Governing Bidding Programs, March 16, 1988, Docket No. RM88-5-000, 53 FR 9324, 53 FR 31882 (FERC NOPR).

b. Section 210 of PURPA required the FERC to prescribe "and from time to time thereafter revise," rules requiring electric utilities to offer to purchase electric energy to qualifying cogeneration facilities and qualifying small power production facilities (QFs) at rates that: (1) are just and reasonable to the electric consumers of the electric utility and in the public interest, and (2) do not discriminate against QFs. However, no rule may provide for a rate which exceeds "the incremental cost to the electric utility of alternative electric energy." Section 210(b) of PURPA, 16 U.S.C. §824a-3(b). The term "incremental cost of alternative electric energy" was defined as "the cost to the electric utility of the electric energy which, but for the purchase from such cogenerator or small power producer, such utility would generate or purchase from another source." Sec. 210(d) of PURPA, 16 U.S.C. §824a-3(d).

c. FERC's PURPA rules are found at 18 CFR Part 292. There an electric utility's obligation to purchase from QFs is articulated at 18 CFR §292.303(a):

"Each electric utility shall purchase, in accordance with Sec. 292.304, any energy and capacity which is made *available* from a qualifying facility: (1) Directly to the electric utility; or (2) Indirectly to the electric utility in accordance with paragraph (d) of this section." [Emphasis added.]

d. Section 210(f) of PURPA requires each state commission to implement FERC's rules for each electric utility for which it has ratemaking authority. Accordingly, the Commission adopted Section 317 of its Rules, which follows closely the FERC's PURPA rules. However, the Commission did not adopt the provision of the FERC's rules regarding the obligation to purchase from QFs found at 18 CFR §292.303(a), stating that the corresponding section 317(h)(i) is "reserved."

e. Under a two-year cooperative agreement between the Commission and the United States Department of Energy, a report was prepared concerning prices and service conditions under which utilities can purchase power. In 1983, on the basis of that study, the Commission concluded that the report should be used for guidance in QF tariff, contract, and service matters. *Re Cogeneration and Small Power Production*, 51 P.U.R. 4th 399 (February 28, 1983) (the Report). One of the Report's recommendations was that

capacity credits should be paid to QFs "only when a utility's rate structure reflects a capacity cost savings because of the QF purchase and that the capacity cost savings are demonstrated to be continuous." (*Id.*, Substantive Finding 1.(d)(5).) In the Report, we concluded that "capacity credits should be set and paid according to reliability of power delivery wherein the utility will experience decreased capacity costs because of the QF purchase. *Id.*

f. Section 317 is consistent with the better, and more realistic, interpretation of PURPA by FERC and the states. PURPA does not require an electric utility to make capacity cost payments to a QF if the utility has no need for capacity. In that situation, only an avoided energy cost is payable because the utility's avoided capacity cost is zero. *See, Consumers Power Co. v. Public Service* Commission, 472 N.W.2d 77 (Mich. App. 1991).

g. To determine whether any energy or capacity costs will be avoided by purchasing from a QF, regulators must take all potential sources of supply into account including the purchasing utility's own capacity expansion program as well as those wholesale sources that the utility would have purchased from absent the QF purchase, such as other QFs, independent power producers (IPPs) and other utilities. *SoCal Edison Company and San Diego Gas & Electric Company*, 70 FERC 61,215, 1995 WL 169000 (Feb. 23, 1995), *reconsideration denied*, 71 FERC 61,269, 1995 WL 327268, at 6 (June 2, 1995) (whether a benchmark process alone, a bidding process alone, or a combination benchmark-bidding process is used to establish the actual price paid for QF power, it must take into account all sources, i.e., all technologies and all types of sellers); FERC NOPR ¶32,031.

h. Since PURPA was enacted, the complexion of the wholesale electric power industry has changed and competition has developed in power generation. In *SoCalEdison*, 1995 WL 169000 at 14, FERC stated:

> "When Congress enacted PURPA in 1978, there was very little non-utility generation. In 1978 virtually all new generating capacity was provided by traditional electric utilities. In fact, one of the principal reasons Congress adopted Section 210 of PURPA was because electric utilities had refused to purchase power from non-utility producers. [footnotes omitted] In contrast to 1978, non-traditional producers, including QFs, now provide well in excess of half of all new generating resources, and the Commission has determined that there is no longer any dominance in the provision of new generating capacity." [footnotes omitted]

i. In *SoCalEdison*, 1995 WL 169000 at 14, and with regard to determining avoided costs in today's more competitive power generation environment, FERC has stated:

> "PURPA does not permit either the Commission, or the States in their implementation of PURPA, to require a purchase rate that exceeds avoided cost. * * * Since 1980, the commission has given the States wide latitude in implementing PURPA. [footnotes omitted] * * * However, as noted above, the QF industry is now a developed industry and the need for integration of policy objectives under PURPA and other federal electric regulatory policies is pronounced. * * * As the electric utility industry becomes increasingly competitive, [footnote omitted] *the need to ensure that the States are using procedures which ensure that QF rates do not exceed avoided cost becomes more*

> *critical.* This is because QF rates that exceed avoided cost will, by definition, give QFs an unfair advantage over other market participants (non-QFs). [footnote omitted] This, in turn, will hinder the development of competitive markets and hurt ratepayers, a result clearly at odds with ensuring the just and reasonable rates required by PURPA section 210(b). * * * *We believe it is inconsistent with our obligation under PURPA to ensure just and reasonable rates, and our goals to encourage development of competitive bulk power markets, to permit the use of PURPA to create new contracts that do not reflect market conditions for new bulk power supplies*." [Emphasis added.]

j. Avoided costs may be determined administratively (by benchmark), by competitive bidding, or by a combination of both. (*Id*., 1995 WL 327268 at 6.) In the NOPR, FERC stated that the most obvious and direct way to take all potential sources of supply into account is to allow the purchasing utility, other utilities, independent power producers, and QFs all to directly enter in the bidding. (FERC NOPR at ¶32,026.)

k. Under PURPA, QFs can be required to compete with non-QFs in a competitive bidding process with the result that if a QF is not the successful bidder or does not participate in the competitive bidding process, the utility is not required to purchase any capacity from that QF. (FERC NOPR ¶32,028.) Utilities would only be required to purchase electric energy from such QFs. *Id*.; and *North Little Rock Cogeneration, L.P.,* 72 FERC 61,263 (Sept. 19, 1995).

l. PURPA does not require that QFs be given an opportunity to review the bids offered and match the price and terms of the winning bids. The rationale for this was explained by FERC in the FERC NOPR at ¶32,028:

> "The Commission does not believe that such an opportunity is required under PURPA. To comply with PURPA, all that is required is for the purchasing utility to offer to purchase power from QFs at rates that do not discriminate against QFs. This does not mean that QFs have to be given a second opportunity to submit offers. Also, providing QFs with an opportunity for a "second bite" is likely to discourage other potential power suppliers from participating in the bid."

m. States must determine when a utility must contract with a QF. *Metropolitan Edison Co.*, 72 FERC 61,015, 1995 WL 397198 (1995); *South River Power Partners, L.P. v. Pennsylvania Public* utility, 696 A.2d 925 (Pa. 1997) (viability of a proposed project has to be shown; mere tender of a capacity and energy contract insufficient); *Power Resource Group, Inc. v. Public Utility Commission of* Texas, 73 S.W.3d 354, 360 (Court of App. Texas, Austin 2002) (a legally enforceable obligation does not arise simply because a company receives a self-certification number for an unbuilt facility and then demands that a utility contract to accept its power in the future).

n. Competitive bidding may be used as a means for awarding contracts without violating PURPA. *North Little Rock Cogeneration, L.P.,* 72 FERC 61,263 (Sept. 19, 1995) (QF was not the successful bidder and, therefore, utility could enter into a contract with the non-QF successful bidder); and the FERC NOPR ¶32,028.

o. FERC terminated its NOPR proceeding not because it was incorrect or legally deficient but because the marketplace had evolved to the point at which the NOPR was itself moot. In 1993, over 30 states used competitive bidding (i.e., either the state had adopted provisions for utilities to use bidding or the state at least

permitted utilities to use bidding). 64 FERC 61,364 (September 29, 1993) (terminating the FERC NOPR as moot). By 1995, the number of states which had some type of competitive biding process for new generation resources had grown to 37. FERC Order No. 888, Regulations Preambles at p. 31,651.

p. If the utility does not pursue all-source bidding, there are other ways to meet the requirement to take all sources into account. The FERC NOPR, provides the following examples:

> "Any source excluded from direct participation in the bidding system must be accounted for, however, in a benchmark avoided cost calculation. For example, if only QFs were allowed to participate in the bidding, the benchmark should consist of all the opportunities available from the purchasing utility's own construction, conservation and demand management programs and any other available wholesale purchase alternatives. In other words, the benchmark should include the wholesale sources from which the purchasing utility would have purchased absent purchases from QFs. The benchmark must be based on wholesale power sources that are of the same quality and exhibit the same characteristics as the power sought to be obtained from QFs."

> "In terms of implementation, this benchmark could be developed by either state regulatory authorities or by nonregulated electric utilities. Alternatively, the state regulatory authority could delegate this responsibility to the purchasing utility. For instance, the state regulatory authority could have the utility announce the best alternative expansion program and the avoided cost that the program entails. The purchasing utility could factor into the benchmark any wholesale sources of power that it is aware of. Then a bid could be held for QFs to have an opportunity to displace some or all of the utility's plan. If no QF bids of comparable quantity and quality were priced at or below the benchmark, the QFs would not be able to displace the utility's program. The utility would then take whatever steps its plan indicated and the QFs would not receive avoided capacity payments."

FERC NOPR at ¶¶ 32,032-32,033.

q. Price is not the only factor in awarding contracts or determining avoided costs. The FERC rules implementing PURPA and our Rule 317(l) recognize other factors that must be taken into account in evaluating capacity offered by QFs through a competitive bidding process or otherwise. Consideration of all other relevant factors is necessary because "the production and delivery of electricity is a complex operation" and "a variety of factors ... affect the continued security and operational integrity of the purchasing utility's system." FERC NOPR ¶32,034. Reliability is one of those factors. *Id*.

Conclusions Concerning Qualifying Facilities

80. We are obliged by Wyoming law to set just and reasonable rates and we are obliged by federal law not to discriminate *against* QFs. We are not obliged to discriminate *in favor* of QFs in derogation of the public interest, which here means most particularly the interest of the public in safe, adequate and reliable service at just, reasonable and non-discriminatory rates.

81. In our opinion, Black Hills has stated the better thinking on the evolution of the rights and responsibilities of persons dealing with QF issues under PURPA. From this point of view, allowing a QF to sit aside and observe a "competitive"

bidding process, thereafter allowing it to match the otherwise "winning" proposal of another bidder, corrupts the process to the detriment of the ratepayers. The public is prevented from seeing what the QF's lowest proposed price might be; and the process would be ensured of only halfhearted participation -- if there were any participation -- by other bidders who knew for a fact that no bid they submitted would have any realistic chance of being accepted. If a QF participated fully and fairly in a competitive bidding process and its proposal tied with that of another bidder, we believe that PURPA's concerns regarding QFs in this context would be satisfied if the tie were broken in favor of the QF, or if the utility were to allow a tie breaker bid by each. However, we hasten to add that identical price terms from bidders with different capabilities would not necessarily constitute a "tie." Applying the better view of the QF's relationship to the utility seeking supplies, if Cheyenne Light decides to use competitive bidding for any or all of its future capacity needs, QFs should be full participants in the competitive bidding process and be the competitively successful bidder in order to be awarded a contract. QFs would not have the right to match other bids, but could participate on any equal footing with all other bidders in tie-breaker or "meet or beat" opportunities given to bidders.

82. The issues discussed in the preceding paragraph have not been fully heard in this case. Therefore, because issues related to the respective rights and obligations of Cheyenne Light and Elk Power are beyond the scope of this proceeding, they should be addressed in connection with the consideration of later plans or in other appropriate proceedings as the parties see fit.

83. Cheyenne Light's future resource plans should show how it will meet its capacity needs, including, without limitation, exploration of self-build, self-supply or full or partial requirements options. Cheyenne Light shall also propose a method for determining its avoided costs; and it is free to propose any method of determination it finds appropriate, including, without limitation, competitive bidding, an administrative (benchmarking) proceeding, or any combination of appropriate methods. To ensure that its planning is comprehensive, Cheyenne Light should include planning data on its requirements after the PSCo contract terminates, including planning data forecasting its peak demand, energy needs and load shape commencing in 2008.

84. Future plans should consider all relevant factors which will be used in determining whether or not competing offers (for purposes of awarding contracts, breaking ties, and determining avoided costs) are comparable. For example, [i] if one supplier offers unit-contingent capacity and another supplier offers full requirements service for the same capacity, the offers do not have to be considered comparable; and [ii] the company may make legitimate distinctions on the basis of whether or not it will avoid the cost of ancillary services.

85. This resource plan proceeding is not a traditional rate case in which Cheyenne Light's retail rates are determined and ordered into effect. It concerns the requirements we have imposed on Cheyenne Light to produce and file electric resource plans due in part to the special challenges the company faces in meeting its resource needs in a more competitive environment. This case will, as we said in our notice to the public, ". . . affect Cheyenne Light's sources of supply and the wholesale price for electricity. It will

affect the prices paid for electric service by Cheyenne Light's customers" but this does not mean the effect will be direct or that it will be the only determinative factor in setting rates, as we discuss below.

86. We conclude that it is clearly within the powers of the Commission, as discussed above, to require such resource plans to be filed and to consider them in formal administrative proceedings. In discharging our duty to regulate public utilities, we may accept or reject Cheyenne Light's planning efforts in this case, and may require changes in future plans to better serve the public interest. It is within the Commission's prerogatives in the exercise of its sound discretion to impose a planning requirement, to examine it publicly and to end or extend it, all as the public interest requires.

87. We conclude, in light of the substantial evidence, and in fact the preponderance of the evidence in this case, that we should accept Cheyenne Light's Plan. This acceptance does not carry with it any forward looking ratemaking connotations and does not constitute a decision on any rate making issue whatsoever. The rate making implications of Cheyenne Light's planning efforts will be considered in detail when and as Cheyenne Light may make application to change its rates. No such application may be justified solely on the basis that it was included in or resulted from the Plan.

Facts Concerning the Elk Power Request

88. On October 20, 2003, Elk Power filed its Request that the Commission Take Official Notice of Public Document and Receive Late Filed Exhibit in which it requested that the Commission accept the Verified Petition of PSCo for a Variance in the Filing Date of its Electric Least-Cost Resource Plan and for Shortened Response Time as a late-filed exhibit in this matter. Elk Power argued that "PSCo's resource needs are relevant to the Commission's consideration of Cheyenne Light's request that the Commission approve its four-year contract with PSCo." In its Request, Elk Power cites Section 115(b)(9) which states, in part, that:

> "Nothing herein shall preclude the Commission from requesting and receiving late filed exhibits."

Conclusions on the Elk Power Request

89. Our Rules allow the *Commission* to request late filed exhibits, they do not provide an avenue for *parties* to volunteer additional information as late filed exhibits after the record has been closed. Commission requests for late filed exhibits occur during hearings and therefore allow for a due process consideration of the merits of the potential late exhibits. Elk Power's Request would not afford this procedural safeguard. Elk Power asks the Commission to take "official" notice, but there is no provision for such notice in the Wyoming Administrative Procedure Act. In the Act, W.S. § 16-3-108(d) provides for judicial notice by administrative agencies.

90. We stated above that the instant proceeding is not a rate setting exercise. Further, we note that Cheyenne Light has an all requirements contract with PSCo, and whether or not it might seek additional generation resources is not dispositive

of any issues properly before us in this case. The Elk Power Request should be denied.

Additional Conclusions of Law

91. Cheyenne Light is duly authorized by the Commission to provide retail electric public utility service in its Wyoming service territory pursuant to certificates of public convenience and necessity as issued and amended by the Commission. Cheyenne Light is an electric public utility as defined in W. S. § 37-1-101(a)(vi)(C); and, as such, pursuant to W. S. § 37-2-112, the Commission has the general and exclusive jurisdiction to regulate Cheyenne Light as a public utility in Wyoming.

92. Proper public notice of these proceedings was given in accordance with the Wyoming Administrative Procedure Act, W. S. § 37-2-203 and the Commission's Rules, especially Section 106 thereof. The public hearing was held and conducted pursuant to the provisions of W. S. §§ 16-3-107, 16-3-108, 37-2-203, and applicable sections of the Commission's Rules. The interventions and withdrawals of the various parties were properly granted, and the entities and persons who intervened became parties to the case.

NOW THEREFORE IT IS HEREBY ORDERED THAT:

1. The Plan is hereby accepted, but without any rate making connotations or effects, all of which must be considered in later appropriate proceedings.

2. Future Plans must take into account and include the subjects and showings discussed hereinabove, the intent of the Commission being to require Cheyenne Light to provide electric resource plans which consider all appropriate resource and planning options and provide sufficient detail to show that the consideration was fully and fairly done.

3. Cheyenne Light shall meet with its customers interested in special contracts and work with them to ascertain whether or not Cheyenne Light and the customers may obtain benefits and efficiencies from special contracts, as more fully discussed above. It shall report the results of these meetings to the Commission in the next resource plan.

4. The Commission will make no further inquiry into the Temporary Assignments of the Gillette and Wygen contracts which expired at the end of 2003.

5. The Elk Power Request is hereby denied.

6. This order is effective immediately.

MADE and ENTERED at Cheyenne, Wyoming, on February 28, 2004.

PUBLIC SERVICE COMMISSION OF WYOMING

STEVE ELLENBECKER, Chairman

KRISTIN H. LEE, Deputy Chair

STEVE FURTNEY, Commissioner

(SEAL)
Attest:

STEPHEN G. OXLEY, Secretary and Chief Counsel